

**APR 17 2006**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTONIO CERVANTES-RODRIGUEZ,

Defendant - Appellant.

No. 05-50496

D.C. No. CR-04-08630-MLH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
Marilyn L. Huff, District Judge, Presiding

Submitted April 13, 2006<sup>\*\*</sup>

Before: SILVERMAN, McKEOWN and PAEZ, Circuit Judges.

Antonio Cervantes-Rodriguez appeals the sentence imposed following his guilty plea to being a deported alien found in the United States in violation of 8 U.S.C. § 1326.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Cervantes-Rodriguez contends that the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is severely limited and not valid as applied to his situation, and that the district court violated his constitutional rights in enhancing his sentence under 8 U.S.C. § 1326(b) based on a non-jury fact finding regarding his prior conviction. This contention is foreclosed by *United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (holding that we are bound to follow *Almendarez-Torres*, even though it has been called into question, unless it is explicitly overruled by the Supreme Court). Similarly, there is no merit to Cervantes-Rodriguez's remaining contention that 8 U.S.C. § 1326(b) is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See *United States v. Ochoa-Gaytan*, 265 F.3d 837, 845-46 (9th Cir. 2001) (holding that *Apprendi* carved out an exception for prior convictions that specifically preserved the holding of *Almendarez-Torres*).

**AFFIRMED.**